Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1996

PAUL EASTERDAY,

Petitioner,

vs.

LARRY GILBERT in his individual capacity, and as Sheriff of Okaloosa County, Florida,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court erred by failing to find that the termination of deputy Paul Easterday was, in fact, made in retaliation for the exercise of his constitutional right of free speech.

II. Whether the Court of Appeals and the District Court failed to undertake a meaningful *Pickering* balancing analysis by speculating as to the actual and potential disruptiveness of speech of public concern without weighing the value of the employee's First Amendment rights.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Paul Easterday, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals, which affirmed per curiam the opinion of the District Court was not published, and is reproduced in the Appendix filed herewith (App.) at la-2a. The unreported opinion of the district court in this case is produced at 3a-12a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on November 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provision of the United States Constitution, First Amendment is set forth below:

> Congress shall make no law . . . abridging the freedom of speech .

The pertinent provision of 42 U.S.C. § 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States

> or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

This case arose out of Petitioner Paul Easterday's termination in December, 1991, as a deputy sheriff of Okaloosa County, Florida.

On December 23, 1991, at approximately 7:20 a.m., Easterday was present in the deputies' room of the Crestview district office of the Okaloosa County Sheriff's Office. Easterday was on duty and in uniform at the time, concluding his shift which commenced at 12:00 a.m. Shift change was in progress at this time. During shift change, members of the off-going shift, such as Easterday, met informally with deputies of the oncoming shift to prepare reports, exchange information, and socialize. Present at this time were Easterday's supervisor, Sgt. Dale Griffith, and deputies Tyson, Garrett, and Berry. (R2-33-15-17).

Sheriff Larry Gilbert was campaigning for re-election in a contested political race. Easterday remarked to those present that "Gilbert had never been a cop and, therefore, shouldn't be a sheriff." (R2-39-6). The Sheriff terminated Easterday eight days later for violating a departmental policy which provides: "Members shall not publicly criticize or ridicule the department, its policies, or any of its members." (R2-39-1-2). Easterday made the comment only one time, solely in the presence of the four other deputies with whom he worked, and gave the Sheriff a written apology later that day.

The evidence that Easterday's sole comment was disruptive of the Sheriff's Office was the testimony of the Sheriff, Sgt. Griffith, and deputies Berry and Garrett.

Deputy Garrett testified that Easterday, speaking in a normal tone of voice, said: ". . . anyone that didn't have past law enforcement experience shouldn't be elected sheriff." (R2-32-33). He further testified that the comment did not upset him and that he told Easterday to shut up since he could see that Sgt. Griffith was getting upset. (*Id.*). He further testified that Easterday's comment did not affect his respect for the sheriff, or his and other deputies job abilities. (*Id.*).

Sgt. Griffith, a member of the department since 1977, testified that he overheard Easterday's remark to deputy Tyson that ". . . the sheriff did not need to be sheriff." (R2-31-39).

Sheriff Gilbert's reasons for the termination were:

> 4. I dismissed Deputy Easterday because he made comments which were directly critical of my ability and qualification to lead this agency. Deputy Easterday challenged my leadership abilities and qualifications to lead the Okaloosa County Sheriff's Office by stating, while on duty, and in the presence of four other officers that I should not be sheriff because I had not been a law enforcement officer. When asked by his supervisor what he meant by these remarks, he referred to the fact that I had made a number of mistakes.
>
> 5. It was important that I take decisive action against Deputy Easterday to avoid

other officers from criticizing me or criticizing their supervisors while on duty. His comments had the potential, if not addressed, to have a negative impact upon discipline and the morale of this agency. I was concerned that if I allowed Deputy Easterday or any other deputy to make these disrespectful comments on duty, it would seriously affect my ability to lead the agency. While on duty, I expect the support and respect of my deputies who represent me before the people of Okaloosa County. When given an order, officers must respond positively and quickly. Allowing Easterday or any other deputy to question my management or leadership ability could detrimentally affect the deputies' willingness to responding to an order. The effectiveness of this agency's operations and its ability to serve the citizens of Okaloosa County could therefore be adversely affected.

6. I was aware at the time I dismissed Deputy Easterday that Easterday's sergeant, Dale Griffith, was very upset regarding the remarks that Easterday made in the presence of the other deputies, and that Griffith verbally reprimanded him for these remarks. Whether Easterday actually affected the performance of the deputies who overheard his comments was not as important as the potential for disruption which would occur if I did not discipline Deputy Easterday for his disrespectful and insubordinate remarks.

(R2-32, 43-45).

Deputy Tyson, to whom the remark was directed, testified as follows:

> 5. A political campaign for the office of Sheriff was underway. The conversation turned to being Sheriff, and Paul Easterday remarked that anyone that hasn't had law enforcement experience shouldn't be elected Sheriff, obviously referring to Sheriff Larry Gilbert. The tone of the remark was matter-of-fact and not inflammatory.
>
> 6. Sgt. Griffith told Paul Easterday to shut up and that ended the matter. Aside from Sgt. Griffith, no other officer commented on the subject matter and the group disbanded. Subsequently, I heard nothing of the matter except that Paul Easterday was terminated for having made the remark.
>
> 7. The incident had no effect on my job performance, nor did other officers speak to me of the incident. I had been a member of the Sheriff's Office for over twelve years and ofttimes heard political comment.

(R2-39-6-8).

Easterday filed suit under 42 U.S.C. § 1983, contending that his employment was wrongfully terminated because he exercised his constitutionally protected right of free speech. The District Court found that Easterday's speech constituted a "matter of public concern" because "[s]peech directed to public issues or candidates running for public office 'invariably address[es] matters of public concern because it is 'the unfettered

interchange of ideas for the bringing about of political and social changes desired by the people,"' *citing Stough v. Gallagher*, 967 F.2d 1523, 1527 (5th Cir. 1992). However, when applying the *Pickering* balancing test, the District Court found that "Easterday's comments posed several potential impediments to the functioning of the Sheriff's office;" that "Easterday's comments upset Sergeant Griffith and Deputy Berry regardless of their effect on Deputy Tyson;" that "Gilbert need only demonstrate the potential for disruption based on all the facts and circumstances;" that the time and place of the speech weighed against Easterday — "prior to a shift meeting, while on duty and in uniform;" and that "Easterday's statements effectively challenged Gilbert's ability to lead the Sheriff's office." The district court concluded that "Sheriff Gilbert's interest in maintaining the efficient functioning of his office outweighs Easterday's interest in making the on-the-job remarks at issue." The District Court failed to determine whether Easterday was terminated because of his speech, and made no mention of the value of Easterday's speech when conducting the *Pickering* balancing analysis. (App. B, 8a).

Easterday appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed on the basis of the District Court's opinion. (App. A, 1a-2a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on two important questions concerning employer liability for infringing the First Amendment rights of deputy sheriffs. The first issue is represented by the decision of the Second Circuit in *Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996), wherein the court set forth the necessity of considering the employer's reason for the termination:

To plead a *prima facie* case that he was fired in violation of his First Amendment rights, a plaintiff must establish that: (1) his speech can be "fairly characterized as . . . speech on a matter of public concern;" and (2) the speech was "at least a substantial or motivating factor in the discharge." *Frank,* 1 F.3d at 1328 (internal quotations and citations omitted).

It is clear, though, that a government official may, in certain circumstances, fire an employee for speaking — even on a matter of public concern — where that speech has the potential to disrupt the work environment. *See Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987). In *Jeffries v. Harleston,* 52 F.3d 9 (2d Cir.), *Cert. denied,* __*U.S.* __, 116 S.Ct. 173, 133 L.Ed.2d 114 (1995), we stated that termination does not violate the employee's First Amendment rights where:

> (1) the employer's prediction of disruptions is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

Id. at 13; *see also Waters v. Churchill,* 511 U.S. 661, __, 114 S.Ct. 1878, 1889-91, 128 L.Ed.2d 686 (1994); *see generally Board of County Comm'rs v. Umbehr,* __ U.S. __, __,

> 116 S.Ct. 2342, 2347-48, 2352, 135 L.Ed. 2d 843 (1996). Thus, even if the potential disruption to the office outweighs the value of the speech, the employer may fire the employee only *because of* the potential disruption, and *not because of* the speech. That is to say, it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination decision: such "retaliatory" discharge is always unconstitutional. (Emphasis in original.)

In the present case, Easterday was terminated for violating a sheriff's department policy which provided: "Members shall not publicly criticize or ridicule the department, its policies, or any of its members." Thus, Easterday was specifically terminated because of his speech, regardless of the District Court's subsequent *Pickering* analysis. The decision is directly at odds with the conclusions reached by the Second Circuit in *Sheppard, supra,* and with this Court's decisions in *Pickering* and *Connick v. Myers,* 461 U.S.138, 103 S. Ct.1684, 75 L. Ed. 2d 708 (1983). *See also Waters,* __ U.S. at __, 128 L. Ed. 2d at 701, and 708 (Scalia, J. dissenting). "[I]t is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering,* 391 U.S. at 572. It is necessary to resolve this important question of First Amendment law, and to thereby resolve a conflict between the federal courts of appeal.

Second, the District Court's understanding of an appropriate *Pickering* balancing test appears to have given no or inadequate weight to Easterday's First Amendment rights, contrary to the searching analysis formerly employed in the Eleventh Circuit, *see Stough v. Gallagher,* 967 F.2d 1523, 1528-30 (11th Cir.1992), and decisions of other courts of appeal. Further, the evidence of

disruption and potential for disruption was weak and speculative. This ultimate factual finding by the District Court, affirmed per curiam by the federal Court of Appeals, is obviously in error and inconsistent with the analysis of similar facts by other courts of appeal. The dispute is not so much over the elemental facts as over the constitutional significance to be attached to the facts. The defect in the judgment is that the standard of proof of the potential for disruption of the sheriff's department was considerably less exacting than that required by *Connick, Pickering* and *Waters* to override Easterday's First Amendment rights.

Third, the Eleventh Circuit sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. If the bland, political speech of deputy Easterday is subject to sanctions in the Eleventh Circuit, "policemen . . . are . . . relegated to a watered down version of constitutional rights." *Garrity v. New Jersey,* 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

I.

WHETHER THE COURT ERRED BY FAILING TO FIND THAT THE TERMINATION OF DEPUTY PAUL EASTERDAY WAS, IN FACT, MADE IN RETALIATION OF THE EXERCISE OF HIS CONSTITUTIONAL RIGHT OF FREE SPEECH.

The District Court did not address the core factual issue of the case; that is, whether deputy Easterday was fired in retaliation for protected political speech. "The critical inquiry for the fact finder in these cases is whether the employment decision was, 'in fact, made in retaliation for [the] exercise of the constitutional right of free speech.' " *Waters*, 511 U.S. 661, 128 L. Ed. 2d at

708, *quoting Perry v. Sindermann,* 408 U.S. 593, 598, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Deputy Easterday was terminated for violating a written department policy prohibiting such speech. Accordingly, a *Pickering* balancing requirement did not come into play because Easterday was not terminated because of the actual or potentially disruptive consequences of his speech, but, rather, because of the speech. *See also Connick v. Myers, supra*; *Rankin v. McPherson,* 483 U.S. 378, 383, 107 S. Ct. 2891, 2896, 97 L. Ed. 2d 315 (1987); *Waters,* 511 U.S. 661, 128 L. Ed. at 712 (The First Amendment, however, demands that the Government respect its employees' feedom to express their opinions on issues of public importance. As long as that expression is not unduly disruptive, it simply may not provide the basis for discipline or termination. The critical issues in a case of this kind are (1) whether the speech is protected, and (2) whether it was the basis for the sanction imposed on the employee.) (Stevens, J. dissenting).

II.

WHETHER THE COURT OF APPEALS AND THE DISTRICT COURT FAILED TO UNDERTAKE A MEANINGFUL *PICKERING* BALANCING ANALYSIS BY SPECULATING AS TO THE ACTUAL AND POTENTIAL DISRUPTIVENESS OF SPEECH OF PUBLIC CONCERN WITHOUT WEIGHING THE VALUE OF THE EMPLOYEE'S FIRST AMENDMENT RIGHTS

While this Court has instructed that lower courts are to "look to the facts as the employer reasonably found them to be," and that the government is entitled to consider the "potential disruptiveness of the speech," *Waters v. Churchill,* 511 U.S. 661, 114 S. Ct. at 1889-90, the issue of whether a public employer has a sufficiently good reason to justify infringing upon that right by dismissing the employee will generally depend in

significant part on the nature of the criticism that was voiced, *see Pickering v. Board of Educ.*, 391 U.S. 563, 569-73, 88 S. Ct. 1731, 1735-37, 20 L. Ed. 811 (1968), and a reasonable assessment of the disruptive potential of that speech. *Waters*, 511 U.S. at __, 114 S. Ct. at 1884-86, 1889. Unlike the district court and the summary affirmance by the Eleventh Circuit in the present case, other circuit courts have required a more substantial showing of damage of the government's interest. In *Sanchez v. City of Santa Ann*, 936 F.2d 1027, 1038 (9th Cir.1990), the court found retaliation for protected speech entitled to jury consideration. The plaintiffs had formed the LPOA, met with city personnel, submitted LPOA packet, filed EEOC complaints and instigated legal activities. Certainly such speech was far move disruptive and potentially disruptive than the matter-of-fact speech of Easterday.

The type of substantial showing that is required is demonstrated by the court's analysis in *Wulf v. City of Wichita*, 883 F.2d 842, 860-62 (10th Cir. 1989):

> We turn now to balancing Wulf's interest in writing the letter against the interest of defendants in "promoting the efficiency of the public services it performs through its employees." *Rankin*, 107 S.Ct. at 2896 (quoting *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734). In performing the requisite balancing under *Pickering*, we must bear in mind the heightened interest of a police department in maintaining discipline and harmony among employees. *See Koch*, 847 F.2d at 1452 n. 22 (and cases cited therein); *Waters v. Chaffin*, 684 F.2d 833, 836, 839 (11th Cir.1982).

Pickering directs us to consider a number of factors in balancing the competing interests at stake. "[T]he manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin,* 107 S.Ct. at 2898 (citing *Connick,* 461 U.S. at 152-53, 103 S.Ct. at 1692-93). Pertinent considerations include whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin,* 107 S.Ct. at 2899.

Taken together, the above factors reveal that the state's interest "focuses on the effective functioning of the public employer's enterprise." *Id.* Considering those factors, we find that Wulf's interest in writing the letter outweighed defendants' interest in discharging him. While there was some testimony that Wulf's letter caused controversy among officers and was the topic of conversation, those conversations were also described as "just idle gossip and talk," and there was no evidence that the letter adversely affected discipline. More importantly, there was evidence that at least some of the allegations in Wulf's letter, concerning different treatment of the FOP private club than other private clubs and efforts by superior officers to discourage

lieutenants and other supervisory officers from belonging to the FOP, were already the topic of discussion and concern *before* Wulf wrote his letter. To the extent there was controversy and disruption occasioned by the allegations relating to the FOP, those were not entirely *caused by* Wulf's letter; rather, they were a partial inspiration for Wulf's letter. *See Solomon v. Royal Oak Township,* 842 F.2d at 866.

Similarly, the letter did not adversely affect "close working relationships for which personal loyalty and confidence are necessary." *Rankin,* 107 S.Ct. at 2899. There was testimony that LaMunyon, the person most directly criticized by the letter, was angry and upset when he learned of the letter, but LaMunyon was not someone with whom Wulf worked closely or regularly. Indeed, Wulf and LaMunyon were separated by the chain of command, and Wulf had to seek permission to speak to LaMunyon about Wulf's concerns about the department. Additionally, Wulf did not address the letter to LaMunyon or to any other person with whom he would have regular contact, and when he did finally deliver the letter to the Attorney General, he insisted on confidentiality. Although Wulf showed drafts of the letter to a few other officers, as well as to Assistant District Attorney Jim Puntch, there is no evidence that his showing the drafts, or the final delivery of the letter, had any impact on his relationship with those

other officers or with Puntch or on any other relationships, except that with LaMunyon.

There is also no evidence that the letter either demonstrated Wulf's lack of fitness to perform his duties or "impede[d] the performance of [his] duties." *Id.* Indeed, Wulf's personnel record reveals that he was consistently evaluated as a competent and satisfactory employee. While his evaluation for the year March 1979 through March 1980 (*before he* wrote the letter) expressed a concern about Wulf distinguishing between the "dual job relations of . . . supervisor and FOP office holder," he nonetheless was evaluated as "competent" in every area and overall.

Finally, there was insufficient evidence that Wulf's writing of the letter interfered with the police department's "regular operation." *Rankin,* 107 S.Ct. at 2898. LaMunyon's otherwise essentially unsubstantiated testimony that Wulf's "loyalty and his trust in terms of the burden placed on him was certainly questionable . . . I think it [the letter] had a serious impact in terms of our operation," does not persuade us to the contrary. There has been some confusion about how much disruption must be shown before an employer may discipline or sanction an employee because of that employee's protected speech. *See Melton,* 879 F.2d at 716. Some circuits suggest that a reasonable belief that disruption will occur

is sufficient in certain circumstances. *See id.* at 716 n. 11. However, "purely speculative allegations" are insufficient. *Id. (27)* Although LaMunyon testified that he felt the letter disrupted the operations of the department, insufficient evidence supporting or demonstrating such disruption was presented. *See Key v. Rutherford,* 645 F.2d 880, 885 (10th Cir.1981) ("operational efficiency objections to speech must be real and important before they can serve as a basis for discipline or discharge of a public employee.").

In sum, there is simply insufficient evidence that the *letter itself* interfered with effective functioning of the police department. Rather, the evidence supports the conclusion that Wulf's letter was seeking to rectify malfunctions already present in the department. Additionally, there is no evidence that LaMunyon would ever have realized the impropriety in his use of departmental funds to mail Christian Police Officers' Association bulletins without Wulf's letter. *See Brawner v. City of Richardson, Texas,* 855 F.2d at 192; *Marohnic v. Walker,* 800 F.2d 613, 616 (6th Cir.1986).

Neither Wulf's position as a police officer, nor the heightened interest of a police department in maintaining discipline persuade us that the balance should tip in favor of the department. We therefore hold that Wulf's interest in writing the letter

> outweighed the department's interest in terminating him because of it.

Similarly, in *Garetto v. Mason,* 100 F.3d 803, 812 (10th Cir. 1996), the court, noting in part that "advocacy of a particular candidate for public office is the type of core political speech the First Amendment was designed to protect," conducted a searching analysis to determine whether the government showed substantial potential for disruption, stating:

> Once a court determines that the plaintiff's speech involves a matter of public concern, the *Pickering* balancing test requires a court to weigh "the interest of a public employee in commenting on such matters [against] the interest of the employer in promoting the efficiency of its services." *Ware v. Unified Sch. Dist. No. 492,* 881 F.2d 906, 910 (10th Cir.1989), *modified in part,* 902 F.2d 815 (1990). In performing this balancing, the court should not consider the statement in a vacuum; the manner, time, and place of the employee's expression are relevant, as well as the context in which the statement arose. *Connick,* 461 U.S. at 152-53, 103 S.Ct. at 1692-93.
>
> Under the *Pickering* balancing test, the employee's First Amendment free speech rights are protected "unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Wren,* 793 F.2d at 1318 (quoting *Childers v. Independent Sch.Dist. No. 1,* 676

> F.2d 1338, 1341 (10th Cir.1982)). Relevant considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin,* 483 U.S. at 388, 107 S.Ct. at 2899. The government, however, cannot rely on purely speculative allegations that certain statements caused or will cause disruption to justify the regulation of employee speech. *Wulf v. City of Wichita,* 883 F.2d 842, 862 (lOth Cir.1989). Furthermore, the government's concerns about the impact of speech must be reasonable and formed in good faith. *Waters v. Churchill,* 511 U.S. 661, __, 114 S.Ct. 1878, 1889, 128 L.Ed.2d 686 (1994).
>
> A careful review of the record indicates that the defendants failed to introduce any evidence of actual disruption to EWC's services arising from the remaining four speech incidents at issue in this case.

The Fourth Circuit also employs a searching analysis to determine whether a police officer's free speech rights are outweighed by the employer's interest in promoting the efficiency of the public services. In *Cromer v. Brown*, 80 F.3d 1315, 1327-29 (4th Cir. 1996), a police lieutenant's right to speak freely about alleged broad-based racial discrimination in the department was found not to carry such potential for disruption,

discipline, morale and good working relationships in the department as to preclude his speech from being protected.

The Seventh Circuit also gives substantial consideration to terminations of public employees for political support of competing interests, and undertakes an in depth analysis of the importance of the speech at issue. *See Zorzi v. County of Putnam*, 30 F.3d 885, 896-97 (7th Cir. 1994).

The defendant has failed to identify a reasonable basis for his actions in terminating Easterday for seemingly innocuous political commentary. In *Patkus v. Sangamon – Cass Consortium*, 769 F.2d 1251, 1258 (7th Cir. 1985), it was noted that a court should look to the "ordinary or foreseeable effect of the conduct . . . to determine whether it would be reasonably calculated to create division or to have impaired discipline."

Also, this is not a case where the government's justifications for regulating speech are stronger because an officer's critical statements related to someone with whom the officer had to work closely. In *Joyner v. Lancaster*, 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830, 108 S. Ct 102, 98 L. Ed. 2d 62 (1987), the court rejected the First Amendment claims of a discharged captain in the sheriff's department in part because he was "a highly placed official in a para-military unit," and because "[he] had an important role in the implementation of the sheriff's policies, and he was an essential link between the sheriff and the deputies whom he supervised." Similarly, in *Campbell v. Towse*, 99 F.3d 820 (7th Cir.1996), the court found a police watch commander's letter of opposition to a community-oriented policing program inconsistent with the chief of police's need for loyalty of his subordinates who work in the highest echelons and are entrusted with carrying out his orders, at times under trying conditions.

Further, the only apparent disruption of the sheriff's department was the sharp reaction of Sergeant Griffith to what he considered disloyal speech by Easterday. Yet, Easterday's bland statement of political opinion was clearly neither disruptive to the department as a whole nor likely to be. Further, the form and content of Easterday's speech was relevant in determining whether the sheriff "may constitutionally be required to tolerate some degree of disruption resulting from the utterance." *Connick,* 461 U.S. at 164 n. 4, 103 S. Ct at 1699 n. 4 (Brennan, J. dissenting). While the court determined that Easterday's speech addressed a matter of public concern, if failed to weigh the importance of that speech against the employer's interest. Rather, the court disregarded any consideration or statement of the importance of Easterday's speech and speculated as to the speech's potential for disruption. The *Pickering* analysis requires particularized balancing based on the unique facts presented in each case. *Connick,* 461 U.S. at 150, 103 S. Ct. at 1691-92. The district court opinion is bereft of any balancing analysis, and the summary affirmance thereof, demonstrates that police officers have watered-down First Amendment rights in the Eleventh Circuit.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 5, 1996

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2648
Non-Argument Calendar

D.C. Docket No. 93-30628-LAC

PAUL EASTERDAY,

Plaintiff-Appellant,

versus

LARRY GILBERT; SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(November 5, 1996)

Before BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Upon a de novo review of the record in this case, we affirm

the summary judgment entered in favor of Defendant-Appellee for the reasons set forth in the district court's order of April 18, 1996.

AFFIRMED.

APPENDIX B — JUDGMENT AND ORDER OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA DATED APRIL 18, 1996

United States District Court

Northern District of Florida

Docket Number

CIVIL ACTION NO. 93-30628/LAC

Name of Judge or Magistrate Judge

LACEY A. COLLIER

Case Title:

PAUL EASTERDAY

V.

LARRY GILBERT, individually and in his official capacity as Sheriff of Okaloosa County, Florida

JUDGMENT IN A CIVIL CASE

* * *

X **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.

Appendix B

IT IS ORDERED AND ADJUDGED

Judgment is entered against plaintiff, PAUL EASTERDAY, in favor of Defendant, LARRY GILBERT, individually and in his official capacity as Sheriff of Okaloosa County, Florida.

ROBERT A. MOSSING, CLERK

By Deputy Clerk: Jerry Marbut
s/ Jerry Marbut April 18, 1996

ENTERED ON DOCKET April 18, 1996 BY irw

Copies mailed to: *Evans, Tipler, COB: 1996*

Appendix B

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

CIVIL ACTION NO. 93-30628/LAC

PAUL EASTERDAY,

Plaintiff,

v.

LARRY GILBERT, individually and in his official capacity as Sheriff of Okaloosa County, Florida,

Defendant.

ORDER

This is a civil rights action pursuant to 42 U.S.C. § 1983. Defendant moves for summary judgment arguing no genuine issues of material fact exist and he is entitled to judgment as a matter of law. (doc. 31). For the reasons below, the motion is granted.

I. *Background*

Plaintiff Paul Easterday is a former Deputy Sheriff for Okaloosa County, Florida. On December 23, 1991, he made several critical remarks about Okaloosa County's elected Sheriff, Larry Gilbert, during a morning shift change. While in uniform and in the presence of four other deputies, Easterday commented that Gilbert, who was up for re-election at the time, "had never been a cop and, therefore, shouldn't be a sheriff."

Sergeant Dale Griffith overheard the comment and asked Easterday what he meant by it. Easterday responded, "Just look at all the mistakes he has made." Griffith asked Easterday to identify the mistakes, and Easterday answered, "Just all his mistakes." Griffith then became angry and responded that the only mistake Sheriff Gilbert had made was hiring Easterday.

Eight days later, Sheriff Gilbert discharged Easterday, explaining he could not have people criticizing him behind his back in front of other deputies. In 1993 Easterday filed this action alleging he was discharged for exercising his First Amendment right to freedom of speech. This motion for summary judgment followed.

II. *Discussion*

Pursuant to Federal Rule of Civil Procedure 56, Sheriff Gilbert urges the Court to enter summary judgment in his favor. In support, he argues Easterday cannot maintain a section 1983 action because his on-the-job remarks were not protected by the First Amendment. At the outset, the Court notes motions for summary judgment can be granted only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Everett v. Napper,* 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "genuine" if the record as a whole could lead a rational trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "material" if it might affect the outcome of the case under the governing law.

Id. In ruling on a motion for summary judgment, the Court must take the evidence in a light most favorable to the nonmoving party. *Griesel v. Hamlin,* 963 F.2d 338, 341 (11th Cir. 1992). With this standard in mind, the Court agrees judgment should be entered for Sheriff Gilbert.

A public employee's right to freedom of speech is not absolute. *See Bryson v. City of Waycross,* 888 F.2d 1562, 1565 (11th Cir. 1989). Rather, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Under certain circumstances, therefore, a government employer may lawfully discharge an employee for making public remarks or comments.

To determine whether a given discharge is lawful, the Court must make two inquiries. First, the Court must determine whether the speech at issue constitutes a "matter of public concern." *Bryson,* 888 F.2d at 1565 (quoting *Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). Assuming it does the Court must then conduct a balancing test, weighing the employee's interest as a citizen in commenting upon matters of public concern against the state's interest as an employer in promoting efficiency in the delivery of public services. *Id.* (quoting *Pickering,* 391 U.S. at 568). If the state's interest outweighs that of the employee, no First Amendment violation has occurred. Both inquiries are matters of law to be decided by the Court. *Id.* at 1566 n.2.

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A. *"Matter of Public Concern"*

Initially, the Court finds Easterday's comments constitute a "matter of public concern." The statements suggested Gilbert was unfit or unqualified to hold the office of Sheriff. Speech directed to public issues or candidates running for public office "invariably address[es] matters of public concern because it is the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Stough v. Gallagher,* 967 F.2d 1523, 1527 (11th Cir. 1992) (internal citations omitted).

B. *Pickering Balancing Test*

Accordingly, the Court must balance Easterday's interest in making these remarks against Sheriff Gilbert's interest in maintaining the efficient operation of his office. *See Pickering,* 391 U.S. at 568. Three criteria are relevant to this inquiry: (1) whether the speech at issue impeded the government's ability to perform its duties efficiently, (2) the time, place and manner of the speech, and (3) the context in which the speech was made. *Bryson,* 888 F.2d at 1567. For the reasons below, the Court finds this balance favors Sheriff Gilbert.

1. *Impediment to Government Functions*

An employee's speech impedes government functions if it "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 1562 (quoting *Rankin,* 483 U.S. at 388).

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In this case, Easterday's comments instantly caused friction with his co-workers. Upon hearing the remarks, Seargeant Griffith became angry, challenged Easterday to explain himself, and then personally insulted him.[1] During the exchange, Deputy Ralph Garrett noticed Sergeant Griffith was becoming so angry that he twice warned Easterday to "shut up." Similarly, the comments upset Deputy Hank Berry, who submitted an affidavit stating, "deputies are an extension of the [S]heriff, and it troubled me that Easterday was openly critical of the Sheriff while on duty and in the presence of other officers such as myself."

Moreover, Easterday's comments posed several potential impediments to the functioning of the Sheriff's office. According to Sheriff Gilbert's affidavit, morale and discipline are essential to the proper functioning of his office. When the Sheriff gives an order, deputies must respond positively and quickly. By criticizing his ability in front of other on-duty officers, Easterday challenged Gilbert's leadership ability. Had the Sheriff not acted decisively in disciplining Easterday, dissention might have grown, thereby affected other officers' willingness to respond to the Sheriff's orders.

Deputy Ralph Garrett agreed: "Negative statements towards the Sheriff or other law enforcement officers may cause a problem to agency morale. . . . Failure to discipline a deputy for making disrespectful remarks, such as those made by Deputy Easterday, could open the door to other deputies challenging the Sheriff's ability to lead the agency." Likewise, Sergeant Griffith stated:

---

1. Griffith reportedly said the only mistake Sheriff Gilbert had made was hring Easterday's "red-headed ass."

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> Criticizing fellow workers and supervisors, including the Sheriff, in the presence of other officers is detrimental to maintaining the harmony and morale of the officers, which is so important to a law enforcement agency. . . . Deputy Easterday's comments, if not addressed, could have brought unrest, lack of discipline, and disrupted the harmony among the deputies, which would detract the agency from performing its mission of promoting the safety of persons and property throughout Okaloosa County.

The Eleventh Circuit recognizes the special concerns of maintaining discipline in police departments. "Order and morale are critical to successful police work: a police department is 'a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers.' " *Hansen v. Soldenwagner,* 19 F.3d 573, 577 (11th Cir. 1994) (internal citations omitted); *see also Connic v. Meyers,* 461 U.S. 138, 151-52, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.)"

Easterday argues in response that summary judgment should not be granted because a genuine issue remains whether his comments, in fact, impeded or disrupted the functioning of the Sheriff's office. In support, he submits the affidavit of Greg Tyson, an officer present when the comments were made. Tyson maintains Easterday's remarks had no effect whatsoever on his own job performance.

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The Court finds Tyson's affidavit insufficient to defeat summary judgment for two reasons. First, the evidence shows Easterday's comments upset Sergeant Griffith and Deputy Berry regardless of their effect on Deputy Tyson. In this Court's view, a comment need not upset every officer on the force before it can be considered disruptive.

Secondly, at any rate, Sheriff Gilbert need not prove Easterday's comments *actually* caused any disruption in the office. As recognized by the Supreme Court, a government employer need not wait for events to deteriorate to the point of actual disruption or destruction of working relationships before taking action against an employee. *See Connick,* 461 U.S. at 152. Gilbert need only demonstrate the potential for disruption based on all the facts and circumstances. The facts here reach the necessary level.

2. *Time, Place and Manner*

The fact Easterday's statement impeded, and might have further impeded, the efficient functioning of the Sheriff's office is even more evident upon examining the second factor: the time, place, and manner in which the speech was delivered. Easterday made the critical statements to his fellow deputies just prior to a shift meeting, while on duty and in uniform. *See Bryson,* 888 F.2d at 1567 (speech unprotected when employee "chose to spend police department time broadcasting his rancor"). Such comments are far different then the off-duty, out-of-uniform remarks found protected in *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982).

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3. *Context*

The third factor — context — also weighs in Sheriff Gilbert's favor. Easterday's statements effectively challenged Gilbert's ability to lead the Sheriff's Office. For reasons already discussed, Gilbert had a powerful motive to deal with such remarks decisively.

In sum, the Court has applied the *Pickering* balancing test and finds Sheriff Gilbert's interest in maintaining the efficient functioning of his office outweighs Easterday's interest in making the on-the-job remarks at issue. Easterday's speech therefore was not protected by the First Amendment, and he cannot maintain a section 1983 action based on his discharge.

III. *Conclusion*

Accordingly, it is hereby **ORDERED**:

1. Defendant's motion for summary judgment (doc. 31) is **GRANTED**.

2. The Clerk shall enter judgment against Plaintiff in favor of Defendant.

ORDERED on this 18th day of April, 1996.

s/ Lacey A. Collier
Lacey A. Collier
U.S. District Court

APPENDIX C — COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 93-30628LAC

PAUL EASTERDAY, an individual,

Plaintiff,

vs.

LARRY GILBERT, an individual, and SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendants.

COMPLAINT

Plaintiff sues the Defendants and alleges:

1. Plaintiff, Paul Easterday, is a resident of Crestview, Florida, and a former deputy sheriff of Okaloosa County, Florida.

2. Defendant, Larry Gilbert ("Gilbert"), is a resident of Okaloosa County, Florida, and at all material times was Sheriff of Okaloosa County, Florida.

3. Sheriff, Okaloosa County, Florida ("Sheriff"), is a political subdivision of Okaloosa County, Florida.

4. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). Venue of this action is proper under 28 U.S.C. § 1391(b).

5. Plaintiff, at all material times, was employed by Sheriff as a deputy sheriff. On or about December 23, 1991, Plaintiff presented himself for work at the Okaloosa County Sheriff's Department. Prior to the shift meeting, Plaintiff commented to three or four other deputy sheriffs that "Gilbert had never been a cop and, therefore, shouldn't be a sheriff".

6. At that time, a contested political race was underway for the office of Sheriff of Okaloosa County.

7. On December 31, 1991, eight days later, Sheriff Gilbert retaliated and terminated Plaintiff as a deputy sheriff for having made such a remark. The reason given by the Sheriff was that the Plaintiff had violated a department policy which states, "Members shall not publicly criticize or ridicule the department, its policies, or any of its members".

8. A grievance committee of the Sheriff's Office reviewed the dismissal and unanimously approved the Sheriff's act of dismissing Plaintiff.

COUNT ONE

9. This is an action for declaratory judgment and a mandatory permanent injunction.

10. Paragraphs one (1) through eight (8) are incorporated herein.

11. Plaintiff contends that he was wrongfully discharged because he had exercised his constitutionally protected right of free speech; that is, that the Sheriff, acting under color of state law, deprived Plaintiff of his public employment in retaliation for expression protected under the first amendment.

12. Defendant contends that Plaintiff was terminated for violating established Sheriff Department policy prohibiting public criticism or ridicule of the Sheriff.

13. Plaintiff is in doubt about Plaintiff's rights under 42 U.S.C. § 1983 to protection from wrongful discharge for expression protected by the first amendment.

WHEREFORE, Plaintiff demands judgment as follows:

1. A judgment declaring Plaintiff's rights.

2. A preliminary and permanent injunction reinstating Plaintiff as a deputy sheriff, Okaloosa County, Florida.

3. Damages in an amount equal to the pay that Plaintiff has lost as a consequence of the wrongful discharge by the Sheriff.

4. A reasonable attorney's fee.

5. Such other and further relief as the Court deems just and proper.

COUNT TWO

14. This is an action by Plaintiff against Gilbert for damages pursuant to 42 U.S.C. § 1983 for deprivation of Plaintiff's first amendment free speech rights under color of state law.

15. Paragraphs 1 through 8 are incorporated herein.

16. Acting under color of authority of his office as Sheriff

of Okaloosa County, Florida, Gilbert deprived Plaintiff of his right under the First and Fourteenth Amendments of the United States Constitution to freely express his political opinion as to the qualifications of a sheriff, a matter of public concern during an ongoing political campaign for the office of sheriff.

17. Plaintiff made the comment only once, only in the presence of other deputy sheriffs assembled at the Sheriff's Office, and that same day wrote a letter of apology to the Sheriff. The speech was in no manner disruptive of the Sheriff's Office.

18. Plaintiff has suffered damages in lost wages and loss of employment as a deputy sheriff, a job to which Plaintiff had aspired from early school days. Plaintiff has suffered humiliation, loss of personal reputation, loss of dignity, and emotional distress as consequence of his termination of employment.

19. Defendant, Gilbert's, acts were spiteful, malicious, and outrageous, for which Plaintiff claims punitive damages.

WHEREFORE, Plaintiff demands judgment as follows:

1. Lost wages.

2. Punitive damages of $1,000,000.

3. For a reasonable attorney's fee.

4. Costs of this action.

5. For such other and further relief as the Court deems proper.

Appendix C

THE TIPLER LAW OFFICES

By: s/ James H. Tipler
Paradise Village
348 South West Miracle Strip Parkway
Suite 18
Fort Walton Beach, FL 32548
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Florida Bar No. 0476307

Plaintiffs hereby demand a trial by jury.

s/ James H. Tipler
Counsel for Plaintiff

Supreme Court, U.S.
FILED
MAR 10 1997
OFFICE OF THE CLERK

No. 96-1246

In The

Supreme Court of the United States

October Term, 1996

PAUL EASTERDAY,

Petitioner,

v.

LARRY GILBERT, in his individual capacity, and as Sheriff of Okaloosa County, Florida,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court, in its certiorari discretion, review *Easterday v. Gilbert*, No. 96-2648 (11th Cir. 1996), which per curiam affirmed the District Court's (Northern District of Florida) decision, *Easterday v. Gilbert*, Civil Action No. 93-30628/LAC (N.D. Fla. 1996).

   Stated differently, are there special and important reasons for the Court to exercise its certiorari jurisdiction to review an affirmance of a summary judgment of the District Court, which held that Petitioner's insubordinate on-duty remarks were not protected by the First Amendment, when the opinion does not directly conflict with opinions of this Court or other federal courts on the same issue?

2. Did the Eleventh Circuit, by affirming the summary judgment entered in favor of the Respondent, sanction a departure from the accepted and usual course of judicial proceedings to warrant the exercise of this Court's certiorari jurisdiction?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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BRIEF IN OPPOSITION

Respondent, Larry Gilbert, opposes issuance of a writ of certiorari to review the affirmance of the United States Court of Appeals for the Eleventh Circuit of the judgment of the United States District Court for Northern District of Florida in the above styled case.

OPINION AND JUDGMENT BELOW

Upon consideration of Respondent's motion for summary judgment and memorandum of law, in addition to the affidavits and depositions submitted by parties, the United States District Court for Northern District of Florida entered judgment as a matter of law in favor of Respondent. The District Court held that on-duty comments by Petitioner, a deputy sheriff, which challenged Respondent's qualifications to serve as Sheriff of Okaloosa County, Florida, were not protected by the First Amendment. Specifically, the court found that although Petitioner's remarks constituted a matter of public concern, Respondent's interest in maintaining the efficient operation of his office outweighed Petitioner's interest in making on-the-job comments which were critical of the Sheriff. The District Court's Order, Appendix A, may be found at 1a-10a.

On November 5, 1996, after the parties had submitted briefs,[1] the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment for

[1] Neither party requested oral argument.

Sheriff Gilbert. *Easterday v. Gilbert*, No. 96-2648 (11th Cir. 1996). The unreported opinion, Appendix B, may be found at 11a-12a.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is deficient because it fails to adequately describe the close-knit, paramilitary nature of his work environment. Petitioner's description of the events which gave rise to his dismissal is also lacking because it does not set forth the complete dialogue of the Petitioner and his supervisor, as well as the deputies' reaction to Petitioner's improper remarks. Petitioner further misstates the context of the comments by representing that the speech was politically motivated. Rather, Petitioner's outburst against the Sheriff resulted from a culmination of work-related and personal problems which were completely unrelated to any political issue, such as reelection of the Sheriff.

The Petitioner, Paul Easterday, was hired as a deputy sheriff for the Okaloosa County Sheriff's Office in April, 1987. (R1-33-4). Easterday was assigned to the Crestview district in Okaloosa County. (R1-32-44). A total of 27 officers and employees worked in the Crestview district, which served the citizens of northern Okaloosa County. Due to the paramilitary nature of the Sheriff's Office, and the relatively small size of the district office, the deputies enjoyed close working relationships with each other. (R1-32-44-45).

In 1991, the Petitioner encountered a series of marital and financial problems. He and his wife separated, and

creditors levied on his property, foreclosed on his mortgage, and repossessed a vehicle. (R1-33-10-17). These personal difficulties were very stressful for the Petitioner, and continued to trouble him through December of 1991. (Plaintiff's Deposition, R1-33-23-25 and Exhibit "3" to deposition; R1-33-37).

On December 23, 1991, the Petitioner worked the midnight shift, 12:00 a.m.-8 a.m. Easterday reported to the Crestview district office at approximately 7:20 a.m. for shift change. He was on duty and in uniform at the time. (R1-33-17-19). Present in the deputies' room at this time were Sgt. Griffith, and deputies Tyson, Garrett, and Berry. (R1-33-17-19).

Easterday was under considerable stress at the time of shift change. He was finishing a particularly trying evening, and was coping with the emotional strain of his marital and financial difficulties. (R1-33-25, 34-35, and Exhibit "3" to Petitioner's Deposition).

Several deputies were conversing about service pins that had been given to deputies at the Christmas party, and a comment was made regarding the small writing on the pins. The Petitioner then stated that "(Sheriff) Gilbert had never been a cop and, therefore, shouldn't be a sheriff." (R1-33-20; R2-1-2).

Sgt. Griffith, who had been speaking with Deputy Berry about a case, turned to the Plaintiff and asked him what he meant. Easterday then replied "Look at all the mistakes he's made." When asked by Griffith to identify the mistakes, Plaintiff responded, "Just the mistakes." Griffith, who was upset over Easterday's remarks, then responded that the only mistake the Sheriff made "was

hiring Easterday's red-headed ass". (R1-33-20-22; R1-32-38-42, 48-49). During this exchange between Easterday and Sgt. Griffith, Deputy Garrett twice warned Easterday to be quiet because he could see that Griffith was angry with Easterday as a result of his comments, and he didn't want Easterday to get into trouble. (R1-32-32-33, 48-49, R1-33-21).

Griffith was not the only deputy offended by Easterday's statements. Easterday's personal attack on the Sheriff troubled Deputy Berry, who was upset with Easterday's criticism of the Respondent which he perceived to be disrespectful to the Sheriff's authority and his qualifications to run the Sheriff's Office. (R1-32-46, 47).

Following the confrontation with Sgt. Griffith, Easterday went home after his shift concluded. Upon learning that he had "stirred up a hornet's next" as a result of his statements during the shift change, he wrote a letter of apology to the Sheriff. (R1-33-23-25; Respondent's Exhibit "3" to Deposition of the Petitioner).

When Easterday met Sheriff Gilbert several days later, Gilbert informed the Petitioner that he could not have people talking behind his back and criticizing him in front of other deputies. The Sheriff told him that if he let Easterday get away with it, any officer or employee would be able to engage in the same conduct. The Sheriff then dismissed Easterday for his disrespectful remarks which violated an agency policy prohibiting deputies from criticizing or demeaning other members of the Sheriff's Office. (R2-1-2; R1-33-8-9; Exhibit "1" to Petitioner's Deposition; R1-33-27, 37: R1-32-27, 37, 44-45). Petitioner appealed his termination to a grievance committee, which

unanimously approved the Sheriff's decision to dismiss the Petitioner. (R2-1-8).

ARGUMENT

A. The Eleventh Circuit's Decision Does Not Conflict With *Sheppard v. Beerman* or Decisions of This Court

The asserted conflict upon which Petitioner grounds jurisdiction of this Court does not exist. When this Court reviews the District Court's order granting Respondent's motion for summary judgement and the record in this case, it will be obvious that the Eleventh Circuit's affirmance creates no conflict with the decision of the Second Circuit in *Sheppard v. Beerman*, 94 F.3d 823 (2d Cir. 1996). Rather, the district court's order, affirmed by the Eleventh Circuit, expressly relies on opinions of this Court which have addressed similar First Amendment issues.

It is well settled by this Court that public employee's right to speak on matters of public concern is not absolute. An employer may discipline an employee if the speech has the potential to disrupt the work environment. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). However, a governmental employer is not required to wait for events to deteriorate to the point of actual disruption or destruction of close working relationships before taking action against an employee. *Connick v. Myers*, 461 U.S. 138, 152 (1983).

Both the Second Circuit and the Eleventh Circuit have embraced these concepts. Both courts have recognized that an employee's speech may be restricted when it carries a real potential to disrupt the operations of the agency. In *Sheppard*, the court held that "a government official may, in certain circumstances, fire an employee for speaking – even on a matter of public concern – where the speech has the potential to disrupt the work environment." 94 F.3d at 827, *citing Rankin*, 483 U.S. at 384. The Eleventh Circuit, following *Connick v. Myers*, reached the same conclusion in *McCabe v. Sharrett*, 12 F.3d 1558, 1573 (11th Cir. 1994).

Petitioner's efforts to create a conflict hinge on *Sheppard*'s caveat that the employer's action against the employee must be based on the perceived disruption and not in retaliation for the speech. According to the Petitioner, conflict exists because the Eleventh Circuit, by affirming the summary judgment in this case, condones such retaliation. Such an argument ignores decisions of this Court, the First Amendment analysis of the District Court, and the record in this case.

In a case involving First Amendment issues, the first inquiry is to determine whether the speech at issue addresses a matter of public concern. *Rankin*, 483 U.S. at 384. If the speech involves a matter of public concern, the court then applies the balancing test set forth in *Pickering v. Board of Public Education*, 391 U.S. 563, 568 (1968), weighing the employee's First Amendment interests against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."

In balancing the respective interests of the parties, several factors should be considered including: (1) whether the speech impedes the employer's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made. *Connick*, 461 U.S. at 151-155. In determining whether the speech impeded the duties, the court may examine whether the statement impairs discipline by supervisors or harmony among co-workers, or has a detrimental impact on close working relationships. *Rankin*, 483 U.S. at 388.

The District Court followed *Rankin*, *Connick* and *Pickering* in its discussion of the case, concluding first that Easterday's comments constituted a matter of public concern and then applying the balancing test to the competing interests of the Petitioner and the Respondent. (Appendix B, 6a-12a). In granting the motion for summary judgment, the District Court determined that Respondent's interest in maintaining the efficient functioning of his office outweighed Petitioner's interest in making the on-duty comments at issue. (App. A, 10a). The court found Easterday's comments not only had the potential for disruption, but that disruption to the morale, harmony, and discipline of the deputies actually occurred. (App. A, 9a, "In this case, Easterday's comments instantly caused friction with his co-workers. . . . ") Because of the insubordinate nature of Petitioner's speech and its disruptive effect to the close working relationship of the deputies, the District Court correctly determined that Easterday's First Amendment rights were not offended. *See, Connick*, 461 U.S. at 154, 155.

Moreover, the record amply supports the court's findings. Easterday's insubordinate remarks, which were critical of Sheriff Gilbert's qualifications, infuriated his immediate supervisor, Sgt. Dale Griffith. (R1-32-37, 42; R1-33-21). Deputy Ralph Garrett, upon observing Griffith's apparent anger, twice warned Easterday to "shut up". (R1-32-37; R1-33-21).

Another deputy present at the time, Hank Berry, was also upset with Easterday's criticism of the Sheriff. Deputy Berry considered Easterday's conduct to be disrespectful to the Sheriff and a challenge to his authority and qualifications to lead the Sheriff's Office. Berry was upset because deputies are considered to be an extension of the Sheriff and it troubled Berry that Easterday was openly critical of the Respondent while on duty and in the presence of other officers. (R1-32-46-47).

When the Petitioner met with the Respondent following the incident, Sheriff Gilbert cited Easterday's insubordination as the reason for his dismissal. Gilbert was equally concerned that discipline would be adversely affected if he failed to act decisively. (R1-32-44; R1-33-25-27).

Thus, the evidence of disruption and potential disruption is hardly "weak and speculative" as asserted by the Petitioner. The District Court's decision, affirmed by the Eleventh Circuit, does not conflict with *Sheppard* in view of the District Court's analysis and the record below. The *Pickering* analysis of the District Court, which was affirmed by the Eleventh Circuit is consistent with decisions of this Court and other federal courts, including the Second Circuit.

B. The Eleventh Circuit's Affirmance of the Summary Judgment Does Not Depart From the Accepted and Usual Course of Judicial Proceedings

The Petitioner argues unsuccessfully that the District Court's *Pickering* analysis is flawed. Missing from Petitioner's *Pickering* argument is any deference to the Respondent's legitimate interest in maintaining morale and discipline within his agency.[2]

Petitioner, however, glosses over these issues. Rather, Petitioner argues that because the balancing test has been applied in favor of the employee in cases decided by other circuit courts of appeal, no "meaningful" analysis occurred in the present case. (Petitioner's Brief, p. 10). In the Eleventh Circuit, the Petitioner asserts, law enforcement officers "have watered down First Amendment rights". (*Id.* at 19).

This specious argument necessarily fails because each of the cases relied upon by Petitioner may be readily distinguished by the facts. None of the cases cited by Petitioner favorably compares to the instant case when the speech at issue is considered.

In *Wulf v. City of Wichita*, for example, a city police officer was terminated after he wrote a letter to the Attorney General requesting an investigation of certain activities and incidents in the police department. The court

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[2] However, several of the cases relied upon by Petitioner, including *Wulf v. City of Wichita*, 883 F.2d 842, 860-62 (10th Cir. 1989) and *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996) recognize these concerns.

found no evidence that the letter adversely affected discipline or the close working relationships among the officers. 883 F.2d at 861. Furthermore, any controversy or disruption which may have existed could not be attributed solely to the letter; there was significant discussion among the officers about the issues raised in the letter before it was written. *Id.* For these reasons, the court resolved the *Pickering* balancing test in favor of the plaintiff. *Id.* at 682.

Similarly, the court in *Gardetto v. Mason* found no evidence of actual disruption as a result of the speech in question. In *Gardetto,* a teacher alleged that her First Amendment rights were violated when she was suspended, demoted and then dismissed by the college president after speaking in support of candidates for the college's board of trustees. In balancing the interests of the parties, the Tenth Circuit emphasized that at trial, the college president testified that he did not suspend or demote the plaintiff because of any actual or perceived worry about disruption caused by her speech. 100 F.3d at 816. In applying the *Pickering* analysis to these facts, the court held that teacher's speech was protected by the First Amendment. *Id.*

Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996) follows suit in view of its particular facts. The plaintiff, a deputy sheriff, alleged that he was fired by the sheriff because he joined a black officers' association and complained about perceived racial discrimination in the sheriff's office. The Fourth Circuit, applying *Pickering,* found against the sheriff when considering the impact to discipline, morale, and good working relationships. Specifically, the court found that the speech was not insubordinate or rebellious in

tone; morale was low due to race relations and was not appreciably diminished by the speech; and there was an absence of a close working relationship between the sheriff and the plaintiff before the speech occurred. Thus, on the facts presented, the deputy prevailed. 88 F.3d at 1328, 1329.

The record in each of these cases, then, dictated the conclusion that the employee's speech did not impede the employer's ability to perform its duties sufficiently. In contrast, the District Court properly recognized the Respondent's substantial interest in developing discipline, esprit de corps and uniformity of purpose, and that the Petitioner's conduct adversely affected morale, harmony and discipline. (App. A, 10a; *see, Kelley v. Johnson*, 425 U.S. 238, 246 (1976).

Furthermore, none of the cases cited by the Petitioner involves on-duty speech which, in the presence of other employees, directly challenged the employer's leadership abilities. Unlike the cases cited by the Petitioner, Easterday's personal attack on the Sheriff amounted to insubordination. Statements critical of the head of a paramilitary group carry with them the real potential for damaging cohesion and morale. *Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995); *Busby v. City of Orlando*, 931 F.2d 764, 774 (11th Cir. 1991). The context of Easterday's insubordinate comments, as well as the time (on-duty), place (job-site), and manner (in uniform and in the presence of co-workers) distinguish the instant case from the others cited by the Petitioner.

Finally, it is remarkable that the Petitioner can conclude from a single decision that law enforcement officers' First Amendment rights have been eroded by the Eleventh Circuit. Petitioner should revisit *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982) and *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), in which the court found officers' speech to be protected under the First Amendment. Both cases, however, stand in marked contrast to the instant case because of the facts presented to the court.

In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), a police captain, while *off duty* at a cocktail lounge, referred to the chief as a "bastard" and a "son of a bitch". Holding that the captain's demotion and transfer were unconstitutional the court held:

> It must be remembered that we are talking about off-duty shop talk, which, although regrettably indiscreet and tactless, is nonetheless basically idle bar room chatter. Such conversation generally is not subject to sanction. *Id.* at 838.

Also, in *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), the court found that off-duty campaign activities by the plaintiff for the sheriff's opponent were protected by the First Amendment. The speech in question was not rude or insulting to the sheriff and there was no evidence that the plaintiff's comments disturbed the harmony of his co-workers or detrimentally impacted the close working relationship of his fellow deputies. *Id.* at 1528; *see, Rogers v. Miller*, 57 F.3d at 991.

It is untenable, therefore, for the Petitioner to argue that the Eleventh Circuit has diminished the First

Amendment rights of law enforcement officers in this circuit. It should be obvious that each case rests on its own merits, and that the Eleventh Circuit properly decided the instant case in favor of the Respondent because of the disruption or potential disruption evident from Petitioner's speech.

In view of the record in this case, and the District Court's First Amendment analysis, it is equally untenable to advocate that *Pickering* has been misapplied. The Eleventh Circuit's decision to affirm the summary judgment follows closely opinions of this Court, including *Connick v. Myers*.

The Petitioner's on-duty insubordinate remarks in this case disrupted the close working relationships of the deputies. If the Respondent failed to act decisively, Petitioner's speech would have damaged morale and adversely affected Respondent's effectiveness as head of the agency. The District Court, based on this record, properly determined that Respondent's interest in maintaining the efficient operation of his office outweighed the Petitioner's interest in making on-duty statements which were critical of the Sheriff.

CONCLUSION

The Eleventh Circuit's affirmance of the District Court's Order, therefore, does not conflict with *Sheppard v. Beerman*, or otherwise depart from the First Amendment jurisprudence of this Court and other federal courts. The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 10th day of March, 1997.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PAUL EASTERDAY, Plaintiff, v. LARRY GILBERT, individually and in his official capacity as sheriff of Okaloosa County, Florida, Defendant.	)	CIVIL ACTION NO. 93-30628/LAC

ORDER

(Filed Apr. 18, 1996)

This is a civil rights action pursuant to 42 U.S.C. § 1983. Defendant moves for summary judgment arguing no genuine issues of material fact exist and he is entitled to judgment as a matter of law. (doc. 31). For the reasons below, the motion is granted.

I. Background

Plaintiff Paul Easterday is a former Deputy Sheriff for Okaloosa County, Florida. On December 23, 1991, he made several critical remarks about Okaloosa County's elected Sheriff, Larry Gilbert, during a morning shift change. While in uniform and in the presence of four other deputies, Easterday commented that Gilbert, who was up for re-election at the time, "had never been a cop and, therefore, shouldn't be a sheriff."

Sergeant Dale Griffith overheard the comment and asked Easterday what he meant by it. Easterday responded, "Just look at all the mistakes he has made." Griffith asked Easterday to identify the mistakes, and Easterday answered, "Just all his mistakes." Griffith then became angry and responded that the only mistake Sheriff Gilbert had made was hiring Easterday.

Eight days later, Sheriff Gilbert discharged Easterday, explaining he could not have people criticizing him behind his back in front of other deputies. In 1993 Easterday filed this action alleging he was discharged for exercising his First Amendment right to freedom of speech. This motion for summary judgment followed.

II. Discussion

Pursuant to Federal Rule of Civil Procedure 56, Sheriff Gilbert urges the Court to enter summary judgment in his favor. In support, he argues Easterday cannot maintain a section 1983 action because his on-the-job remarks were not protected by the First Amendment. At the outset, the Court notes motions for summary judgment can be granted only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "genuine" if the record as a whole could lead a rational trier of fact to find for the nonmoving party. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "material" if it might affect the outcome of the case under the governing law. *Id.* In ruling on a motion for summary judgment, the Court must take the evidence in a light most favorable to the nonmoving party. *Griesel v. Hamlin*, 963 F.2d 338, 341 (11th Cir. 1992). With this standard in mind, the Court agrees judgment should be entered for Sheriff Gilbert.

A public employee's right to freedom of speech is not absolute. *See Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). Rather, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Under certain circumstances, therefore, a government employer may lawfully discharge an employee for making public remarks or comments.

To determine whether a given discharge is lawful, the Court must make two inquiries. First, the Court must determine whether the speech at issue constitutes a "matter of public concern." *Bryson*, 888 F.2d at 1565 (quoting *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). Assuming it does, the Court must then conduct a balancing test, weighing the employee's interest as a citizen in commenting upon matters of public concern against the state's interest as an employer in promoting efficiency in the delivery of public services. *Id.* (quoting *Pickering*, 391 U.S. at 568). If the state's interest outweighs that of the employee, no First Amendment

violation has occurred. Both inquiries are matters of law to be decided by the Court. *Id.* at 1566 n. 2.

A. "Matter of Public Concern"

Initially, the Court finds Easterday's comments constitute a "matter of public concern." The statements suggested Gilbert was unfit or unqualified to hold the office of Sheriff. Speech directed to public issues or candidates running for public office "invariably address[es] matters of public concern because it is 'the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Stough v. Gallagher*, 967 F.2d 1523, 1527 (11th Cir. 1992) (internal citations omitted).

B. *Pickering* Balancing Test

Accordingly, the Court must balance Easterday's interest in making these remarks against Sheriff Gilbert's interest in maintaining the efficient operation of his office. *See Pickering*, 391 U.S. at 568. Three criteria are relevant to this inquiry: (1) whether the speech at issue impeded the government's ability to perform its duties efficiently, (2) the time, place and manner of the speech, and (3) the context in which the speech was made. *Bryson*, 888 F.2d at 1567. For the reasons below, the Court finds this balance favors Sheriff Gilbert.

1. Impediment to Government Functions

An employee's speech impedes government functions if it "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 1562 (quoting *Rankin*, 483 U.S. at 388).

In this case, Easterday's comments instantly caused friction with his co-workers. Upon hearing the remarks, Sergeant Griffith became angry, challenged Easterday to explain himself, and then personally insulted him.[1] During the exchange, Deputy Ralph Garrett noticed Sergeant Griffith was becoming so angry that he twice warned Easterday to "shut up." Similarly, the comments upset Deputy Hank Berry, who submitted an affidavit stating, "deputies are an extension of the [S]heriff, and it troubled me that Easterday was openly critical of the Sheriff while on duty and in the presence of other officers such as myself."

Moreover, Easterday's comments posed several potential impediments to the functioning of the Sheriff's office. According to Sheriff Gilbert's affidavit, morale and discipline are essential to the proper functioning of his office. When the Sheriff gives an order, deputies must respond positively and quickly. By criticizing his ability in front of other on-duty officers, Easterday challenged

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[1] Griffith reportedly said the only mistake Sheriff Gilbert had made was hiring Easterday's "red-headed ass."

Gilbert's leadership ability. Had the Sheriff not acted decisively in disciplining Easterday, dissention might have grown, thereby affected other officers' willingness to respond to the Sheriff's orders.

Deputy Ralph Garrett agreed: "Negative statements towards the Sheriff or other law enforcement officers may cause a problem to agency morale. . . . Failure to discipline a deputy for making disrespectful remarks, such as those made by Deputy Easterday, could open the door to other deputies challenging the Sheriff's ability to lead the agency." Likewise, Sergeant Griffith stated:

> Criticizing fellow workers and supervisors, including the Sheriff, in the presence of other officers is detrimental to maintaining the harmony and morale of the officers, which is so important to a law enforcement agency. . . . Deputy Easterday's comments, if not addressed, could have brought unrest, lack of discipline, and disrupted the harmony among the deputies, which would detract the agency from performing its mission of promoting the safety of persons and property throughout Okaloosa County.

The Eleventh Circuit recognizes the special concerns of maintaining discipline in police departments. "Order and morale are critical to successful police work: a police department is 'a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers.' " *Hansen v. Soldenwagner*, 19 F.3d 573, 577 (11th Cir. 1994) (internal citations omitted); *see also Connick v. Meyers*, 461 U.S. 138, 151-52, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)

("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

Easterday argues in response that summary judgment should not be granted because a genuine issue remains whether his comments, in fact, impeded or disrupted the functioning of the Sheriff's office. In support, he submits the affidavit of Greg Tyson, an officer present when the comments were made. Tyson maintains Easterday's remarks had no effect whatsoever on his own job performance.

The Court finds Tyson's affidavit insufficient to defeat summary judgment for two reasons. First, the evidence shows Easterday's comments upset Sergeant Griffith and Deputy Berry regardless of their effect on Deputy Tyson. In this Court's view, a comment need not upset every officer on the force before it can be considered disruptive.

Secondly, at any rate, Sheriff Gilbert need not prove Easterday's comments *actually* caused any disruption in the office. As recognized by the Supreme Court, a government employer need not wait for events to deteriorate to the point of actual disruption or destruction of working relationships before taking action against an employee. *See Connick*, 461 U.S. at 152. Gilbert need only demonstrate the potential for disruption based on all the facts and circumstances. The facts here reach the necessary level.

2. Time, Place and Manner

The fact Easterday's statement impeded, and might have further impeded, the efficient functioning of the Sheriff's office is even more evidence upon examining the second factor: the time, place, and manner in which the speech was delivered. Easterday made the critical statements to his fellow deputies just prior to a shift meeting, while on duty and in uniform. *See Bryson*, 888 F.2d at 1567 (speech unprotected when employee "chose to spend police department time broadcasting his rancor"). Such comments are far different than the off-duty, out-of-uniform remarks found protected in *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982).

3. Context

The third factor – context – also weighs in Sheriff Gilbert's favor. Easterday's statements effectively challenged Gilbert's ability to lead the Sheriff's Office. For reasons already discussed, Gilbert had a powerful motive to deal with such remarks decisively.

In sum, the Court has applied the *Pickering* balancing test and finds Sheriff Gilbert's interest in maintaining the efficient functioning of his office outweighs Easterday's interest in making the on-the-job remarks at issue. Easterday's speech therefore was not protected by the First Amendment, and he cannot maintain a section 1983 action based on his discharge.

III. Conclusion

Accordingly, it is hereby **ORDERED:**

1. Defendant's motion for summary judgment (doc. 31) is **GRANTED.**

2. The Clerk shall enter judgment against Plaintiff in favor of Defendant.

ORDERED on this 18th day of April, 1996.

/s/ Lacey A. Collier
Lacey A. Collier
U.S. District Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-2648
Non-Argument Calendar

D. C. Docket No. 93-30628-LAC

PAUL EASTERDAY,

Plaintiff-Appellant,

versus

LARRY GILBERT; SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(Filed November 5, 1996)

Before BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Upon a de novo review of the record in this case, we affirm the summary judgment entered in favor of Defendant-Appellee for the reasons set forth in the district court's order of April 18, 1996.

AFFIRMED.

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(3)

No. 96-1246

Supreme Court, U.S.
FILED
MAR 21 1997

In The

Supreme Court of the United States

October Term, 1996

PAUL EASTERDAY,

Petitioner,

vs.

LARRY GILBERT in his individual capacity, and as Sheriff of Okaloosa County, Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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13 pp

Petitioner, Paul Easterday, briefly replies to the Brief in Opposition, and states:

The brief in opposition sets forth new matter in the form of a restatement of the case wherein the Respondent laboriously cites parts of the record in support of an argument that Easterday's speech was not only potentially disruptive but allegedly disruptive in fact. The District Court rendered an order on April 18, 1996, granting summary judgment for the Respondent (Petitioner's Brief, Appendix B, pp. 5a-12a), which mirrored the court's earlier order of dismissal (Appendix D) entered March 10, 1994, granting a Rule 12(b)(6), Federal Rules of Civil Procedure, motion to dismiss for failure to state a cause of action. The order to dismiss was reversed by the Eleventh Circuit. (Appendix E).

Thus, it appears clear that the District Court's *Pickering* balancing analysis when ruling on the motion for summary judgment was likely based upon the same opinion the court held prior to the reception of any evidence, as expressed in the order on motion to dismiss for failure to state a cause of action. As such, the reasoning is revealed as pretextual, revealing a bias in favor of the Sheriff.

Easterday's speech, uttered about and during a political race, was neither potentially nor actually disruptive. Easterday was terminated pursuant to a sheriff's department written policy which forbade any speech critical of the Sheriff. That is the essence of this Petition. Easterday was fired because he violated an unconstitutional policy. As stated by the court in *Sheppard v. Beerman*, 94 F.3d 823, 827 (2nd Cir. 1996):

> . . . it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination decision: such retaliatory discharge is always unconstitutional.

Respectfully submitted,

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APPENDIX A — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION FILED MARCH 10, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CIVIL ACTION NO. 93-30628/LAC

PAUL EASTERDAY,

Plaintiff,

v.

LARRY GILBERT and SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendant.

ORDER OF DISMISSAL

Plaintiff has brought this suit under 42 U.S.C. § 1983, alleging that the defendant, Sheriff of Okaloosa County Florida, violated plaintiff's constitutional right to freedom of speech under the First Amendment when he discharged plaintiff from his employment as a deputy sheriff for making a derogatory comment about the Sheriff in the presence of other deputies. In making the statement, plaintiff expressed his opinion that "Gilbert had never been a cop and, therefore, shouldn't be sheriff." Defendant has moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Upon review of the relevant law, the Court concludes that dismissal is appropriate.

Appendix A

Although a state may not impinge upon an employee's First Amendment rights, neither is a public employee's right to freedom of speech absolute. *Bryson v. City of Waycross,* 888 F.2d 1562, 1565 (11th Cir. 1989), *reh'g. denied,* 894 F.2d 414 (1990). The determination of whether a state employer has violated an employee's right to free speech must be made under a four-part test, part of which involves a balancing process. *Id.* The balancing approach was adopted by the Supreme Court in an effort to strike a balance between the competing interests of the employee in commenting on matters of public concern on the one hand and the employer in promoting the efficiency of the public services it performs through its employees on the other. *Id.* (quoting, *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)).

As a threshold matter, the four-part test requires a determination of whether the employee's speech constitutes a matter of public concern. *Bryson,* 888 F.2d at 1565 (quoting, *Rankin v. McPherson,* 438 U.S. 378, 384, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)) (quoting, *Connick v. Myers,* 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)). In making this determination, the statement is not to be considered in isolation; the content, form, and context of the employee's speech are relevant. *Rankin,* 483 U.S. at 384-85.

Once it finds this initial step satisfied, the court then must employ the *Pickering* balancing analysis to determine if the employee's interest in speech outweighs the employer's interest in "effective and efficient fulfillment of its responsibilities to the public." *Connick,* 461 U.S. at 150; *see Bryson,* 888 F.2d at 1565 ("public employee's interests are limited by state's need to preserve efficient government functions"). Again, the statement is not to be considered in a vacuum. Rather, the court

should examine the manner, time, and place of the expression, as well as the context in which the dispute arose. *Rankin*, 483 U.S. at 388. The Supreme Court has recognized several considerations as being relevant to the balancing analysis: "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.*

If, after performing the balancing analysis, the court concludes that the employee's interest outweighs that of the employer, the court, or finder of fact,[1] then determines whether the speech played a " 'substantial part' " in the employer's decision to demote or discharge the employee. *Bryson*, 888 F.2d at 1565. If the employee prevails in this regard, then as a final matter, the state is required to prove by a preponderance of the evidence that " 'it would have reached the same decision . . . even in the absence of the protected conduct.' " *Id.* at 1566.

Applying the above test to the instant case, the Court concludes that the defendant did not violate plaintiff's First Amendment right to freedom of speech by discharging him. At the outset, the Court finds that the statement constituted a matter

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1. Although the third and fourth prongs of the test are matters for the finder of fact, the issue of whether the speech constitutes a matter of public concern and the *Pickering* balancing analysis are both questions of constitutional law for the court. *Bryson v. City of Waycross*, 888 F.2d 1562, 1566 n. 2 (11th Cir. 1989), *reh'g. denied*, 894 F.2d 414 (1990); *Deremo v. Watkins*, 939 F.2d 908, 910 (11th Cir. 1991); *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134, 1140 (4th Cir. 1990) (citing, *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir.), *cert. denied*, 484 U.S. 830, 108 S. Ct. 102, 98 L. Ed. 2d 62 (1987)).

of public concern. The statement suggested that the defendant was unfit, or not qualified, to hold the Office of Sheriff, and was made during a time in which the defendant was seeking re-election. The Eleventh Circuit has held that such speech, that which is directed to public issues or candidates running for public office, "invariably address[es] matters of public concern because it is 'the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Stough v. Gallagher,* 967 F.2d 1523, 1527 (11th Cir.), *reh'g. denied,* 978 F.2d 718 (1992).

Next, the Court concludes, upon examination of the circumstances surrounding the statement, that defendant's interest in maintaining the efficient operation of his department outweighs plaintiff's right to comment on defendant's lack of qualification to hold the title of Sheriff. In line with the Supreme Court's analysis in *Rankin,* the Eleventh Circuit has set forth three criteria relevant to the *Pickering* balancing process: (1) whether the *speech at issue* impede's the government's ability to perform its duties efficiently, (2) the manner, time, and place of the speech, and (3) the context within which the speech was made. *Bryson,* 888 F.2d at 1567 (citing, *Morales v. Stierheim,* 848 F.2d 1145, 1149 (11th Cir. 1988), *cert. denied sub nom., Leon v. Avino,* 489 U.S. 1013, 109 S. Ct. 1124, 103 L. Ed. 2d 187 (1989)).

Turning to the first and second criteria, the Court finds that plaintiff's statement had the potential[2] to impede the efficient

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2. The fact that the statement may not have *actually* caused any disruption is immaterial. The Supreme Court has held that it is not necessary

> for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of

(Cont'd)

functioning of the Sheriff's Department. Without question, a properly functioning sheriff's department depends, in large part, on the close working relationships between the deputies themselves and between the deputies and the Sheriff himself. Public insubordination cannot be tolerated, for it has the potential to foster dissension in the ranks, and dissension among the deputies would undoubtedly impair the personal loyalty and confidence which are so crucial to the efficient functioning of any sheriff's department. The Supreme Court has held that if such conditions are presented by the facts of a particular case, courts should afford "a wide degree of deference to the employer's judgment." *Connick,* 461 U.S. at 151-52.

The fact that plaintiff's statement impeded the efficient functioning of the defendant's office is even more evident upon examination of the time, place, and manner in which the it was delivered. Plaintiff made the statement to his fellow deputies just prior to a shift meeting, while on duty and in uniform.[3] *See Bryson,* 888 F.2d at 1567 (held speech unprotected when employee "chose to spend police department time broadcasting his rancor").

(Cont'd)

working relationships is manifest before taking action.

Connick v. Myers, 461 U.S. 138, 152, 103 S. C.t 1684, 75 L. Ed. 2d 708 (1983).

3. This fact distinguishes the case from *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982), where the officer made the statement to a friend while off duty. If the instant case contained similar facts, the Court would not hesitate to find the speech protected.

Appendix A

With respect to the third criterion, requiring an examination of the context within which the statement was made, the statement was essentially a challenge to the defendant's ability to effectively carry out the duties of the office. As such, the statement was not limited to a personal dispute. *See id.* (recognizing that " 'additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office' ").

Based on the Court's conclusion that plaintiff's statement is not protected speech for which the defendant was forbidden from discharging him, the Court finds dismissal appropriate. Accordingly, defendant's motion to dismiss (doc. 6) is GRANTED and the case is DISMISSED, with prejudice.

DONE and ORDERED this 10th day of March 1994.

s/ Lacy A. Collier
Lacy A. Collier
U.S. District Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA FILED JUNE 6, 1995

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2468

D.C. Docket No. 93-30628/LAC

PAUL EASTERDAY,

Plaintiff-Appellant,

versus

LARRY GILBERT, SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(June 6, 1995)

Before DUBINA, Circuit Judge, RONEY and ESCHBACH*, Senior Circuit Judges.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Appendix B

PER CURIAM:

Accepting as true the facts alleged in Paul Easterday's claim under 42 U.S.C. § 1983 in which he contended his employment was wrongfully terminated because he exercised his constitutionally protected right of free speech, we hold that the district court prematurely dismissed the complaint on a 12(b)(6) motion after applying a *Pickering* balancing test and determining that Easterday's speech was not protected. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides the trial court, on motion, may dismiss a complaint for failure to state a cause of action. In reviewing the dismissal of a complaint under this rule, we follow the same standards applicable to the trial court. We must accept as true all well-pleaded facts in the complaint and all reasonable inferences drawn therefrom. *Oladeinde v. City of Birmingham,* 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied,* 113 S.Ct. 1586 (1993). A court may not dismiss a claim unless "it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of the complaint's allegations." *Arnold v. Board of Education of Escambia County,* 880 F.2d 305, 309 (11th Cir. 1989).

Easterday, formerly a deputy sheriff of Okaloosa County, Florida, alleged he was fired by Sheriff Larry Gilbert eight days after remarking to three or four other deputies prior to their shift meeting that "Gilbert had never been a cop and, therefore shouldn't be a sheriff." At the time, Gilbert was campaigning for re-election in a contested political race. The Sheriff told Easterday he was fired for violating a departmental policy which states: "Members shall not publicly criticize or ridicule the

department, its policies, or any of its members." Easterday claims Gilbert's actions were retaliatory for expressing his political opinion about the sheriff's qualifications for office. According to his complaint, Easterday made the comment one time only, solely in the presence of the deputy sheriffs he worked with, and gave the sheriff a written apology later that day. Easterday claims the statement "was in no manner disruptive of the Sheriff's Office."

To state a claim for relief under section 1983, Easterday had to allege specific facts that show that the defendants, acting under color of state law, deprived the plaintiff of rights secured by the Constitution or federal statutes. 42 U.S.C. § 1983; *Arnold,* 880 F.2d at 309 (this Circuit's heightened pleading standard for § 1983 cases). The First Amendment protects public employees' right to speak about issues of public concern. Whether a public employee's conduct is constitutionally protected involves balancing the employee's interest as a citizen in commenting on matters of public concern with the interest of the state as an employer in promoting the efficiency of the public services it performs. *Pickering,* 391 U.S. at 568.

The district court held that Easterday's speech could be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers,* 461 U.S. 138, 146 (1983). The court concluded, however, that the sheriff's interest in maintaining the efficient operation of his department outweighed Easterday's right to comment on his lack of qualification to be sheriff. Citing our decision in *Bryson v. City of Waycross,* 888 F.2d 1562, 1567 (11th Cir. 1989), the district court found that it was sufficient that Easterday's statement had "the potential to impede the efficient functioning of the Sheriff's Department."

Appendix B

The *Pickering* balancing analysis requires a court to make factual determinations regarding whether the speech at issue impedes the government's ability to efficiently perform its duties based on the manner, time, and place of the speech and the context in which it was made. *Bryson,* 888 F.2d at 1567. Since the Supreme Court has not laid down a general legal standard, each situation must be evaluated on a case-by-case basis. *Pickering*, 391 U.S. at 569. It would appear to be unusual for a case involving the *Pickering* analysis to be dismissed on the pleadings. The parties have not cited nor has our research revealed any court of appeals that has sustained a 12(b)(6) dismissal under similar circumstances. *Cf. Terry v. Cook,* 866 F.2d 373 (11th Cir. 1989) (affirming dismissal using different analysis developed for cases in which employees are discharged for political patronage); *Sanguigni v. Pittsburgh Board of Public Education,* 968 F.2d 393 (3rd Cir. 1992) (affirming district court's finding that teacher's statements in faculty newsletter were not a matter of public concern); *Hall v. Ford,* 856 F.2d 255 (D.C. Cir. 1988) (affirming dismissal using balancing test but requiring less-stringent government burden of proving interference due to athletic director's policymaking role).

Reading the allegations favorably to the plaintiff, the district court was premature in dismissing Easterday's complaint for failure to state a claim on which relief *might* be granted. *Oladeinde,* 963 F.2d at 1486. There is nothing in the complaint to substantiate the determination that Easterday's statement might have a potentially disruptive effect on the sheriff's office. Easterday's complaint, which we must accept as true, asserts that there was no disruptive effect.

To be treated as a motion for summary judgment, notice would have to be given to the parties under F.R.C.P. 56.

VACATED AND REMANDED.